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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

LORI K. LEFLER, on behalf of) Case No. EDCV 06-00740-MLG
J.D.W.,)
)
 Plaintiff,) MEMORANDUM OPINION AND ORDER
)
 v.)
)
 MICHAEL J. ASTRUE,)
 Commissioner of the)
 Social Security)
 Administration,)
)
 Defendant.)
)

I. Factual and Procedural Background

This is an action for judicial review of the Commissioner's final decision denying an application for Supplemental Security Income benefits filed by Lori Lefler on behalf of her eleven-year-old son, J.D.W.¹ Plaintiff applied for benefits on May 15, 2002, alleging that he has been disabled since birth due to chronic fungal sinusitis, migraine headaches, breathing problems, and an inability to retain information. (Administrative Record ("AR") 115.) Plaintiff was diagnosed with

¹ Plaintiff was born on May 21, 1995, and will soon be twelve years old.

1 laryngomalacia (soft, floppy larynx) at a very early age and, when
 2 Plaintiff was sixteen months old, he was in a car accident that caused
 3 opacification of his right maxillary sinus. (AR 13.) These two
 4 conditions are apparently the causes of Plaintiff's medical problems.

5 The application was denied initially and upon reconsideration. (AR
 6 35-43.) A de novo hearing was held on December 16, 2003, before
 7 Administrative Law Judge ("ALJ") Robert K. Rogers, Jr. (AR 10.) In a
 8 decision issued on March 25, 2004, ALJ Rogers found that Plaintiff
 9 suffers from chronic sinusitis and asthmatic bronchitis, which
 10 constitute "severe" impairments, but that Plaintiff does not experience
 11 marked or extreme limitations in any of the six domains that are used to
 12 determine disability in children.² (AR 23-24.) Based on these findings,
 13 ALJ Rogers concluded that Plaintiff is not disabled under the Social
 14 Security Act. (AR 24.)

15 Plaintiff sought judicial review of ALJ Rogers' decision in this
 16 Court. The parties filed a Stipulation of Remand, and on March 16, 2005,
 17 this Court remanded the case for further administrative proceedings. (AR

18 ² Unlike the five-step process used to determine if an adult is
 19 disabled, the procedure for determining childhood disability involves
 20 three steps. First, the Commissioner must determine whether the claimant
 21 is engaged in any substantial gainful activity. 20 C.F.R. § 416.924(a).
 22 If so, then the claimant is not disabled. Id. Second, the Commissioner
 23 must determine whether the claimant's physical or mental impairments,
 24 viewed separately or in combination, are "severe" as defined by the
 25 social security regulations. Id. §§ 416.924(c), 416.924a(a)(4). If not,
 26 then the claimant is not disabled. Third, the Commissioner must
 27 determine if the claimant's impairments meet, medically equal or
 28 functionally equal a listed impairment in the regulations, and if the
 impairments have lasted or are expected to last for at least 12 months.
 Id. § 416.924(d). The impairment will be considered functionally
 equivalent if the claimant has marked limitation in two of the following
 domains, or extreme limitations in one domain: (1) acquiring and using
 information; (2) attending and completing tasks; (3) interacting and
 relating with others; (4) moving about and manipulating objects; (5)
 caring for yourself; and (6) health and physical well-being. Id. §§
 416.926a(b), (d).

1 426.) *Lefler v. Barnhart*, Case No. EDCV 04-0953-MLG. The Appeals Council
2 in turn remanded the case to an administrative law judge with
3 instructions to obtain evidence from a medical expert and to obtain
4 additional evidence to clarify the opinions of certain treating medical
5 sources. (AR 424-25.)

6 A second hearing was held on February 7, 2006, before ALJ Mason D.
7 Harrell, Jr. (AR 412.) Supplemental records were obtained from the
8 treating sources. Dr. Colin Hubbard, M.D., a pediatrician, testified as
9 a medical expert. (AR 412, 415-16.) In his decision denying the
10 application, ALJ Harrell found that J.D.W. suffered from severe
11 impairments caused by asthma, chronic sinusitis, and suspected rhinitis,
12 but that his impairments did not medically or functionally equal a
13 listed impairment and that he therefore is not disabled. (AR 415-22.)

14 Plaintiff then filed the instant action, claiming that ALJ Harrell
15 erred by: 1) failing to comply with the Appeals Council's remand order;
16 2) improperly considering the opinions of two treating physicians; and
17 3) failing to properly consider Plaintiff's mental limitations.

18

19 **II. Standard of Review**

20 Under 42 U.S.C. § 405(g), a district court may review the
21 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
22 decision must be upheld unless "the ALJ's findings are based on legal
23 error or are not supported by substantial evidence in the record as a
24 whole." *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
25 evidence means such evidence as a reasonable person might accept as
26 adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389,
27 401 (1971); *Widmark v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It
28 is more than a scintilla, but less than a preponderance. *Robbins v. Soc.*

1 Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006). To determine whether
 2 substantial evidence supports a finding, the reviewing court "must
 3 review the administrative record as a whole, weighing both the evidence
 4 that supports and the evidence that detracts from the Commissioner's
 5 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If
 6 the evidence can support either affirming or reversing the ALJ's
 7 conclusion," the reviewing court "may not substitute its judgment for
 8 that of the ALJ." *Robbins*, 466 F.3d at 882.

9

10 **III. Medical Opinions of Dr. Crockett and Dr. Ferdman**

11 Plaintiff claims that ALJ Harrell's consideration of the opinions
 12 of Dennis M. Crockett, M.D., and Ronald M. Ferdman, M.D., was erroneous
 13 in two respects: 1) ALJ Harrell failed to abide by the Appeals Council's
 14 order to obtain evidence that provided the bases for Dr. Crockett and
 15 Dr. Ferdman's conclusions; and 2) ALJ Harrell improperly rejected the
 16 opinions of Dr. Crockett and Dr. Ferdman. (Jt. Stip. 3-13.)

17 Plaintiff was treated by multiple physicians, including Dr.
 18 Crockett, of Children's Hospital Los Angeles, who performed a number of
 19 surgeries on Plaintiff over the course of six years.³ In mid-2002, Dr.
 20 Crockett referred Plaintiff to Dr. Ferdman, also of Children's Hospital
 21 Los Angeles, who performed extensive immunological and allergen testing
 22 in order to determine the origin of Plaintiff's complaints. (AR 14.)
 23 According to ALJ Rogers' evaluation of the results, the testing did not
 24

25 ³ Dr. Crockett performed an ethmoidectomy and antrostomy in March
 26 1996. Following the car accident, Dr. Crockett performed a revision of
 27 the right antrostomy on April 14, 1998. On January 15, 2002, Dr.
 28 Crockett performed a tonsillectomy, adenoidectomy, and release of
 ankyloglossia. (AR 13-14.) All of these appear to have been outpatient
 procedures. (AR 538-39.)

1 reveal any allergic reactions or immunological deficiencies to account
2 for Plaintiff's complaints. (AR 15.) Prior to Plaintiff's initial
3 administrative hearing, Dr. Crockett and Dr. Ferdman prepared letters
4 "To Whom It May Concern" describing Plaintiff's condition.

5 Dr. Crockett briefly described Plaintiff's symptoms and treatment
6 history, and opined: "His allergies and his sinus disease do create
7 significant impact for his daily living, and he has poor retention in
8 school, possibly secondary to all of this." (AR 287.) The letter closed
9 by encouraging the reader to "do whatever you can to help him." (Id.)
10 ALJ Rogers accorded Dr. Crockett's letter little weight for the
11 following reasons: 1) his statement that Plaintiff's "allergies"
12 negatively impact his daily living is inconsistent with the results of
13 allergy tests administered by Dr. Ferdman; 2) there is no indication
14 that Dr. Crockett's reference to Plaintiff's "poor retention in school"
15 was based on a review of Plaintiff's school records; and 3) from the
16 closing line in which Dr. Crockett encourages the reader to help
17 Plaintiff, it "appears [Dr. Crockett has] taken on the role of advocate
18 for the claimant and his mother, which suggests that his findings were
19 an accommodation in part in an attempt to assist the claimant in his
20 disability claim, rather than for treatment purposes." (AR 15.)

21 Dr. Ferdman stated in his letter, "These chronic sinus infections
22 have significantly affected his normal activities of daily living
23 including his attendance at school and ability to concentrate and learn
24 at school. It also effects his behavior and it has been fairly
25 consistent that his behavior will get out of control during a flare [up]
26 of his sinus disease." (AR 288.) The ALJ gave little weight to Dr.
27 Ferdman's opinion because: 1) Dr. Feldman's treating records do not
28 reflect a review of Plaintiff's daily activities or school records; and

1 2) Dr. Ferdman's clinical findings do not support his opinion;
2 specifically, Plaintiff's breathing and spiroometry were within normal
3 limits. (AR 14.)

4 Following this Court's remand order, the Appeals Council remanded
5 the case to an administrative law judge and, in regards to the opinions
6 expressed in the letters from Dr. Crockett and Dr. Ferdman, stated,
7 "Clarification should be obtained from these sources as to the bases for
8 their opinions." (AR 425.)

9 Children's Hospital Los Angeles submitted fifty-four pages of
10 supplemental records prior to the proceedings on remand. (AR 475-529.)
11 ALJ Harrell explicitly incorporated ALJ Rogers' discussion of the
12 medical evidence into his decision, to the extent that it was not
13 inconsistent with the orders issued by this Court or the Appeals
14 Council, then reviewed the newly submitted material. (AR 415.) ALJ
15 Harrell agreed with ALJ Rogers' conclusion and found that the opinions
16 of Dr. Ferdman and Dr. Crockett are entitled to little weight. (AR 416.)
17 ALJ Harrell gave the following explanation for his conclusion:

18 [T]heir opinions are entitled to little weight because they
19 are without rational explanation, unsupported by objective
20 evidence, inconsistent with the medical evidence, including
21 their own treating records, contain assumptions—such as that
22 sinus disease causes behavioral problems—that lack even a
23 common sense basis, and appear to be written solely in an
24 attempt to assist and appease the claimant's mother.

25 (AR 416.) ALJ Harrell also noted that the supplemental records did not
26 indicate that Dr. Crockett and Dr. Ferdman's opinions were based on
27 Plaintiff's school records. (Id.)

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1 **A. Whether the ALJ Complied with the Appeals Council's Order to**
 2 **Obtain Evidence**

3 Plaintiff focuses on ALJ Harrell's statement that "no evidence has
 4 been submitted since Judge Rogers' decision was issued to show that
 5 either Dr. Ferdman or Dr. Crockett ever reviewed the claimant's school
 6 records," and claims that remand is warranted because ALJ Harrell failed
 7 to follow the Appeals Council's order to obtain clarification "from
 8 these sources as to the bases for their opinions." (Jt. Stip. 3-4.)

9 It is true that the regulations direct the ALJ on remand to "take
 10 any action that is ordered by the Appeals Council...,"⁴ 20 C.F.R. §
 11 416.1477(b), but Plaintiff fails to show that the ALJ failed to follow
 12 the Appeals Council's directive. The Appeals Council ordered the ALJ to
 13 obtain evidence that would clarify the bases for the opinions of Dr.
 14 Crockett and Dr. Ferdman, and the ALJ obtained fifty-four pages of
 15 supplemental records. There is no indication that the request for
 16 supplemental records was somehow inconsistent with the Appeals Council's

17 ⁴ Instead of citing the relevant regulation, Plaintiff states, "The
 18 Ninth Circuit held that 'evasion of the full effect of the remand order
 19 justified further remand for the required analysis...because the ALJ is
 20 bound to follow the Appeals Council's order "and may not take any
 21 additional action that is not inconsistent with the Appeals Council's
 22 remand order.'" (Jt. Stip. 4) (citing *Ruiz v. Apfel*, 24 F. Supp.2d
 23 1045, 1050 (C.D. Cal. 1998)).

24 This is not the first time the Plaintiff's attorney has inserted
 25 this exact passage in a Joint Stipulation filed with this Court.
 26 Addressing this quote in a prior case, this Court pointed out four
 27 separate errors contained in the passage and admonished Plaintiff's
 28 attorney as follows:

29 The manner in which Bishop's counsel employed this authority
 30 is at best extremely careless and at worst an intentional
 31 attempt to mislead the Court. The Court will assume it is the
 32 former. But Bishop's counsel is reminded that he is an officer
 33 of the Court and that his misrepresentations to this Court
 34 could result in sanctions in the future.

35 *Bishop v. Barnhart*, No. SACV 05-1194-MLG, at 5 n.3. Counsel is
 36 specifically informed that his continued use of this incorrect
 37 boilerplate language will result in the imposition of sanctions.

1 order, or that the submitted records somehow fail to comport with the
2 request. The order broadly instructed the ALJ to obtain any clarifying
3 evidence; he was not required to specifically obtain the school records
4 that Plaintiff assumes formed the basis for the opinions.

5 It is the duty of the ALJ to evaluate the evidence and make
6 appropriate findings, including determining credibility. *Magallanes v.*
7 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). Consistent with this duty, the
8 ALJ properly noted that the supplemental records do not indicate that
9 Dr. Crockett and Dr. Ferdman relied upon objective evidence in forming
10 their opinions concerning Plaintiff's school attendance and performance.

11 **B. Whether the ALJ Properly Considered the Medical Opinions of**
12 **Dr. Crockett and Dr. Ferdman**

13 Plaintiff claims that ALJ Harrell summarily rejected the opinions
14 of Dr. Crockett and Dr. Ferdman, as expressed in the letters discussed
15 above, without giving a proper basis for his decision. (Jt. Stip. 7-13.)

16 It is the responsibility of the ALJ to resolve conflicts and
17 ambiguities in the medical record and determine credibility. *Meanel v.*
18 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999); *Andrews v. Shalala*, 53 F.3d
19 1035, 1039 (9th Cir. 1989). An ALJ should accordingly give deference to
20 a treating medical source's opinion as to the nature and severity of an
21 impairment if it is well supported and not inconsistent with other
22 substantial evidence. SSR 96-2p, 1996 WL 374188, at *1 (S.S.A. July 2,
23 1996). This is "[b]ecause treating physicians are employed to cure and
24 thus have a greater opportunity to know and observe the patient as an
25 individual...." *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996).

26 If the opinion of a treating physician is not contradicted by
27 another physician, the ALJ may only reject it for clear and convincing
28 reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Even if it

1 is contradicted by another physician, the ALJ may not reject the opinion
2 without providing specific and legitimate reasons supported by
3 substantial evidence in the record. *Id.* Nevertheless, "[t]he ALJ need
4 not accept the opinion of any physician, including a treating physician,
5 if that opinion is brief, conclusory, and inadequately supported by
6 clinical findings." *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir.
7 2002).

8 ALJ Harrell did not err in rejecting those portions of the letters
9 that opine about Plaintiff's performance in school. One of the purposes
10 of the proceeding on remand was to clarify the bases for the physicians'
11 opinions regarding Plaintiff's school performance. Consistent with this
12 directive, ALJ Harrell noted the absence of any evidence to support
13 these portions of the opinions and appropriately rejected them.

14 Plaintiff is otherwise correct that ALJ Harrell's decision,
15 standing alone, does not provide specific and legitimate reasons for
16 rejecting the opinions of Dr. Crockett and Dr. Ferdman. ALJ Harrell
17 summarily states that the opinions are "without rational explanation,
18 unsupported by objective evidence, inconsistent with the medical
19 evidence, including their own treating records, contain
20 assumptions...that lack even a common sense basis, and appear to be
21 written solely in an attempt to assist and appease the claimant's
22 mother." (AR 416.) It is error for an ALJ to merely recite a list of
23 generic reasons for rejecting the opinion of treating physicians.
24 Moreover, the sweeping invective used by ALJ Harrell in characterizing
25 the opinions is clearly unwarranted by the record.

26 But ALJ Harrell's decision did not stand alone. He also
27 incorporated the reasoning of ALJ Rogers to the extent that it was
28 consistent with the Appeals Council's order. (AR 415.) The rationale

1 provided by ALJ Rogers was not found to be in error; rather, the Appeals
2 Council ordered further clarification by the medical sources. Upon
3 receiving and reviewing the supplemental evidence supplied by the
4 medical sources, ALJ Harrell legitimately found that the reasons
5 provided by ALJ Rogers were "relevant and accurate." (Id.)

6 Moreover, J.D.W.'s ability to acquire and use information was
7 specifically addressed by Dr. Hubbard at the administrative hearing. He
8 stated that based upon J.D.W.'s most recent report card (AR 168-70.) and
9 psychometric testing, his math reasoning, math facts, reading level and
10 spelling were at or above grade level. (AR 540-41.) To the extent that
11 he was deficient in any area, such deficiency could not be attributed to
12 his sinusitis. (AR 541.)

13 ALJ Rogers provided clear and convincing reasons for giving little
14 weight to the physicians' opinions. As discussed above, ALJ Rogers
15 discredited Dr. Crockett's opinion because it assumed that Plaintiff
16 suffered from allergies, which was contradicted by later clinical tests
17 conducted by Dr. Ferdman that did not indicate any allergies. ALJ Rogers
18 also discredited Dr. Ferdman's opinion because it was inconsistent with
19 his own clinical findings that Plaintiff's breathing and spirometry were
20 normal. These inconsistencies provide specific and legitimate bases for
21 rejecting the physicians' opinions. *Thomas*, 278 F.3d at 956-57.

22 In light of the proper bases incorporated from ALJ Rogers'
23 decision, any error committed by ALJ Harrell in evaluating the
24 physicians' reports was harmless. *Burch v. Barnhart*, 400 F.3d 676, 679
25 (9th Cir. 2005). Even if the opinions contained in the letters were
26 credited, they are not inconsistent with ALJ Harrell's decision. The
27 physicians merely offered general opinions about the impact of
28 Plaintiff's condition, but in no way implied that the condition was

1 disabling. Dr. Crockett stated that Plaintiff's symptoms "create
2 significant impact for his daily living," and Dr. Ferdman stated that
3 Plaintiff suffers from "nasal congestion, stuffy nose, headaches, []
4 difficulty breathing through his nose..., shortness of breath and
5 wheezing," which affect "his normal activities of daily living",
6 including his behavior, which "will get out of control during a flare
7 [up] of his sinus disease." (AR 287-88.) ALJ Harrell found that
8 Plaintiff "clearly has occasional shortness of breath, headaches, sinus
9 infections, and bronchitis which interfere with his daily activities, at
10 least to some extent," and exhibits "occasionally disruptive behavior."
11 (AR 422.) Although ALJ Harrell did not rely upon the physicians'
12 opinions as the basis for his decision, he found that Plaintiff's
13 infirmities had the same affect as expressed by the physicians, but not
14 to a degree that warrants a finding of disability.

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16 **IV. Limitations on Plaintiff's Intellectual Functioning**

17 On September 5, 2002, Nick Andonov, Ph.D., performed a complete
18 psychological evaluation of Plaintiff. Plaintiff received a full-scale
19 IQ score of 76 on the Wechsler Intelligence Scale for Children-III
20 ("WISC-III"), which indicates that Plaintiff is within borderline range
21 of intelligence. (AR 280, 282.) Plaintiff claims that ALJ Harrell erred
22 by failing to consider whether Plaintiff's IQ score constitutes a severe
23 impairment. (Jt. Stip. 15-16.)

24 ALJ Harrell did not fail to consider Dr. Andonov's findings. As
25 discussed above, ALJ Harrell incorporated ALJ Rogers' discussion of the
26 medical evidence, which included a summary of Dr. Andonov's report and
27 the WISC-III results. (AR 15-16, 415.) ALJ Harrell necessarily drew upon
28 this evidence in determining the extent of Plaintiff's limitations in

1 acquiring and learning information, the first domain. (AR 417.) ALJ
2 Harrell noted that "testing initially suggested the claimant was
3 functioning intellectually in the low average range," but that
4 subsequent school records and the testimony of medical expert Colin
5 Hubbard, M.D., reveal that claimant has no limitation in acquiring and
6 using information. (AR 417.)

7 The ALJ is responsible for resolving conflicts in medical
8 testimony. *Magallanes*, 881 F.2d at 750. ALJ Harrell properly considered
9 the evidence, in this instance by reference to ALJ Rogers' decision, and
10 concluded that, notwithstanding Plaintiff's IQ score, he is not limited
11 in his use of information. Dr. Andonov's findings arguably support the
12 conclusion that Plaintiff is extremely limited in his intellectual
13 functioning, but this Court "may not substitute its judgment for that of
14 the ALJ." *Robbins*, 466 F.3d at 882.

15

16 **V. Conclusion**

17 For the reasons stated above, it is **ORDERED** that the decision of
18 the Commissioner be affirmed and this case be dismissed with prejudice.

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20 DATED: May 9, 2007



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22 MARC L. GOLDMAN
23 United States Magistrate Judge
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